

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 10, 2003 Session

**CHILHOWEE TRAILER SALES, INC. v.
INTERNATIONAL CHRISTIAN CHURCH, ET AL.**

**Appeal from the Circuit Court for Blount County
No. L-12196 W. Dale Young, Judge**

FILED APRIL 29, 2003

No. E2002-00901-COA-R3-CV

This is a suit to collect deficiencies on six retail installment contracts. These deficiencies resulted following the repossession and sale of six motor homes, part of the collateral for the obligations represented by the contracts. The motor homes had been originally sold – ostensibly to an entity identified as International Christian Church (“the church”) – by Chilhowee Trailer Sales, Inc (“the plaintiff”). The trial court held that Charles Clendell Walker and his wife, Delores Walker (“the Walkers”), entered into a civil conspiracy with the church and others¹ to defraud the plaintiff in connection with the sale of the motor homes – title to all of which had been placed in the name of the church. The plaintiff was awarded a judgment, including prejudgment interest, of \$620,189.43, against the Walkers and the church, jointly and severally. The Walkers and the church appeal, arguing that (1) the trial court erred in finding that they had been involved in a civil conspiracy; (2) the court erred in finding that Robert Charles Coburn, Sr., another defendant, acted as their agent so as to bind them to the retail installment contracts; and (3) the award is speculative and amounts to a windfall. We affirm.

**Tenn. R. Civ. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, JJ., joined.

F.D. Gibson, Maryville, Tennessee, for the appellants, International Christian Church, Charles Clendell Walker and Delores Walker.

William A. Reeves, Knoxville, Tennessee, for the appellee, Chilhowee Trailer Sales, Inc.

¹The plaintiff was awarded default judgments against defendants Robert Charles Coburn, Sr. and Garvis “Sonny” Wooley, and there were default judgments awarded to the Walkers and the church against Coburn and Wooley. None of these judgments are before us on this appeal.

OPINION

I.

The church is an unincorporated association operated by the Walkers out of the office building owned by them in Petal, Mississippi. The Walkers own several corporations whose ostensible business purposes include the selling of burial insurance and the establishing of assisted living facilities. The Walkers' daughter was a secretary for the church; but she was not paid out of church funds, but rather by another corporation wholly owned by the Walkers. The church had no assets and was run exclusively by the Walkers. Though the Walkers had articles of incorporation prepared for the church sometime in the 1980s and even signed them at one point, the church was never incorporated. However, the Walkers kept a copy of these articles on file in their office. The purported business purpose of the church was to provide a Christian ministry by assisting other churches. The record does not reflect that the church was engaged in any religious activities during the seven years prior to trial.

In 1997, the Walkers met Coburn. Subsequently, the couple provided him with office space free of charge. This space was in the same building as the one out of which the Walkers operated the church and their various corporations. The Walkers admitted that Coburn had access to all their business locations and their fax machine. The heading on most of the faxes sent to the plaintiff indicates their origin as that of the Walkers' businesses. The plaintiff received most of the correspondence from Coburn regarding the motor home purchases from this fax machine. Coburn also used the Walkers' office address as his own.

Between March 19, 1998, and December 11, 1998, Coburn arranged for the purchase of eight motor homes from the plaintiff. On March 19, 1998, Coburn made the original purchase of three motor homes. All of the vehicles were titled in the name of the church. Coburn presented the plaintiff with the church's unregistered "articles of incorporation." On this occasion, the Walkers accompanied Coburn to the plaintiff's lot to pick up the three motor homes. The Walkers never actually used any of the original three motor homes. Mr. Walker testified that he went on that trip only to help bring the motor homes back to Mississippi. As was the case with all the transactions, Coburn, as the church's trustee, signed the contracts on behalf of the church. The plaintiff was aware that the Walkers were on its lot that March day and it was also aware that they were the principals of the church. On April 30, 1998, Coburn faxed a copy of the church's application for a Tennessee sales and use tax exemption to the plaintiff. On May 6, 1998, he faxed a copy of the church's certificate of exemption from sales and use tax to the plaintiff. The form was dated May 5, 1998, and effective December 1, 1987. The application for this exemption was signed by Mr. Walker. Attached to the faxed copy was a memo from Coburn explaining that the sales of the motor homes would not be subject to the Tennessee sales and use tax. Over the next seven months, Coburn would arrange for the purchase of five additional motor homes. On December 11, 1998, the Walkers returned to the plaintiff's lot to pick up the motor home they would personally use. It was one of the eight motor homes titled to the church and one of three motor homes purchased on December 11,

1998. The contract on this motor home – signed by Coburn on behalf of the church – was paid in full and this obligation is not at issue on this appeal.

In addition to its perception that the Walkers were involved in the motor home purchases, the plaintiff also relied on a fax purporting to be a copy of the minutes of the church's board meeting authorizing Coburn to purchase all the motor homes for the church. As previously noted, the faxes sent by Coburn had a heading of Mississippi businesses owned by the Walkers.

While Mrs. Walker asserted that she had maintained the minutes of the church's board, she claimed that the minutes were no longer in existence. Apparently, the minutes were supposedly "lost." Nevertheless, the Walkers both asserted that the church's board, consisting of themselves and their daughter, never resolved to authorize Coburn to make purchases beyond the one motor home they used.

Even though the church was the title owner of each of these motor homes, the insurance, in each case, was secured and paid for by the individual who used the motor home in question.² As previously mentioned, the Walkers used only one of the vehicles, and the debt associated with that vehicle was paid off when the Walkers traded it to another dealer. One other motor home was paid off from the estate of that vehicle's user. The other six of the eight loan contracts for the motor homes titled in the church's names fell into default and the vehicles were repossessed. It appears that no payments were ever made on these six contracts. It is undisputed that the plaintiff expended significant resources in repossessing the vehicles. Although the titles reflected the church as the owner, all the repossessions were made from the control of parties other than the Walkers and the church. Following repossession and sale of the motor homes, there existed a total deficiency on principal of \$500,745.43.

At trial, the Walkers testified that "crooks" infiltrated their enterprises and, without their knowledge, used these businesses to perpetrate this fraud upon the plaintiff. They assert that Coburn only had authority to purchase the one motor home used by the Walkers – one of the two for which payment in full has been made. Despite this claim, the record shows that the Walkers had knowledge that several people around them had recently obtained motor homes from the plaintiff. The vehicles' operators even parked these vehicles in the parking lot at the Walkers' office building, at times with the Walkers' permission. Regardless, the Walkers both testified that they had no idea that any motor home other than the one they personally used was titled in the name of the church. They assert that Coburn had bought the other motor homes from the plaintiff in deals having nothing to do with the church and that they had no idea that these motor homes were titled in the church's name.

As another part of the conspiracy, the plaintiff alleges the existence of a series of asset transfers involving corporations and business interests of the Walkers, the church, Coburn, or their business associates. The plaintiff described some of the subject corporations as essentially worthless

² All of these individuals were business associates of the Walkers and/or Coburn.

shells. The purpose of the transactions, so the theory goes, was to create the appearance of value in various stock certificates and annuities issued by the corporations. At least some of the paper ultimately became property of the church and was then used as additional collateral on the motor home contracts. By the time the plaintiff repossessed the motor homes, these stock certificates and annuities provided to the plaintiff as additional collateral had essentially no value. At least one of these corporations was owned by the Walkers, while others were owned by Coburn and the other motor home users. Interestingly enough, the Walkers' address was also the address of some of these other corporations.

II.

In response to the issues raised by the Walkers and the church, the plaintiff contends the Walkers' actions, engaged in through the church, caused them monetary harm reasonably assessed by the trial court. In addition, the plaintiff contends that the court below correctly concluded that the Walkers, through the church and with the other defendants, engaged in a civil conspiracy to defraud the plaintiff. The plaintiff argues that Coburn had agency authority to deal with the plaintiff on the church's behalf.

III.

This is a non-jury case and, as such, is subject to our *de novo* review upon the record of the proceedings below. There is no presumption as to the correctness of the trial court's conclusions of law. See **Campbell v. Florida Steel Corp.**, 919 S.W.2d 26, 35 (Tenn. 1996). However, as mandated by Tenn. R. App. P. 13(d), there is a presumption that the trial court's findings of fact are correct and we must honor that presumption unless the evidence preponderates to the contrary. **Union Carbide Corp. v. Huddleston**, 854 S.W.2d 87, 91 (Tenn. 1993). Further, the trial court, having seen and heard the witnesses testify, is in the best position to determine the witnesses' credibility. See **Bowman v. Bowman**, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991).

IV.

A.

The Walkers and the church argue that the damage award is both speculative and a windfall. They point to the fact that the plaintiff bid in the motor homes at the judicial sale. Their "windfall" argument is based upon the fact that the plaintiff has resold four of the six motor homes and will probably sell the other two. They argue that this shows that the plaintiff will not suffer any damages.

It is well settled that, in the absence of a commercially unreasonable sale or other fraud, a debtor remains liable to a creditor for that portion of a debt not recovered by way of the sale of repossessed property. Tenn. Code Ann. § 47-9-615 (2001); **Marriott Employees Fed. Credit Union v. Harris**, 897 S.W.2d 723, 726 (Tenn. Ct. App. 1994) (applying former § 47-9-504). The fact that the secured party successfully purchases the property for resale is of no consequence to the

calculation of deficiency liability. In this case, the plaintiff was not made whole by the sale of the motor homes at auction. Therefore, it is entitled to seek recovery of the deficiencies remaining after the sale. This issue is found adverse to the Walkers and the church.

B.

The Walkers and the church argue that the trial court erred in finding a civil conspiracy. A civil conspiracy has been defined thusly:

[The] tort [of civil conspiracy] has been defined as a “combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means.” *Dale* [*v. Thomas H. Temple Co.*], 186 Tenn. [69,] 90, 208 S.W.2d 344,] 353 [(1948)]. [Additional citations omitted]. This Court in *Dale* further explained that a conspiracy to defraud means a “common purpose, supported by a concerted action to defraud, that each [conspirator] has the intent to do it, and that it is common to each of them, and that each has the understanding that the other has that purpose.” *Dale*, 186 Tenn. at 90, 208 S.W.2d at 353-54. Also, the “agreement need not be formal, the understanding may be a tacit one, and it is not essential that each conspirator have knowledge of the details of the conspiracy.” *Id.*

Chenault v. Walker, 36 S.W.3d 45, 52 (Tenn. 2001) (bracketing around “conspirator” in original). The Walkers urge that the burden of proof in a civil conspiracy case is that of clear and convincing evidence. We disagree. It is clear that a preponderance of the evidence is all that is required. *See Dale*, 186 Tenn. at 90, 208 S.W.2d at 354; *Cunningham v. Crye-Leike, Inc.*, No. 02A01-9203-CH-00058, 1993 WL 11721, at *3-*4 (Tenn. Ct. App. W.S., filed January 22, 1993). Interestingly enough, the trial court’s memorandum opinion recites that its finding of a civil conspiracy was supported by the evidence whether the burden of proof be that of a preponderance of the evidence or clear and convincing evidence.

The Walkers and the church argue that rather than being engaged in a civil conspiracy, they were merely used by people around them. The trial court expressly found that this their testimony

in this regard was not credible. The trial court adopted the plaintiff's proposed findings of fact.³ A copy of those findings are attached as an appendix to this opinion. After carefully reviewing the evidence in this case, we have concluded that it does not preponderate against the trial court's factual findings. Furthermore, we hold that these findings support the trial court's determination that the Walkers and the church, along with others, engaged in a civil conspiracy to defraud the plaintiff in connection with the purchase of the motor homes.

The trial court expressly noted Mr. Walker's testimony that "Coburn would just put something in front of me and I'd just sign it..." This was Walker's explanation as to how his signature came to be on the tax exemption application. It is clear, however, that the Walkers knew of the purchases of the motor homes. Mr. Walker, on behalf of the Mississippi-based church, signed an application for a Tennessee sales and use tax exemption well in advance of the Walkers' "own" motor home purchase, but at a time when the form could be available for the other transactions. This evidence, coupled with the unexplained disappearance of the church's minutes, is consistent with the trial court's finding of a civil conspiracy. We also agree with the trial court that there is clear and convincing evidence that the Walkers, the church, and others were involved in a civil conspiracy to defraud the plaintiff.

C.

As previously stated, the Walkers and the church insist that Coburn lacked sufficient authority to bind them and the church to the retail installment contracts with the plaintiff. The plaintiff counters that the Walkers, at the very least, created an appearance that Coburn was acting as the agent for the church. This court has recently described the criteria for the creation of apparent agency authority as follows:

Apparent authority is most often defined as:

Such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence

³The trial court's memorandum opinion, incorporated by reference into its judgment, includes the following:

The Court expressly finds and adopts as its finding [sic] of fact the Plaintiff's proposed finding [sic] of fact filed with the Clerk It is detailed and complete and constitutes an accurate accounting of the facts of this case.

See Tenn. R. Civ. P. 52.01. *See also Delevan-Delta Corp. v. Roberts*, 611 S.W.2d 51, 53 (Tenn. 1981) ("Findings prepared by the trial judge which represent his independent labor are preferable, however we do not disapprove of party-prepared findings. . . . We wish to point out that before adopting findings prepared by counsel, the trial judge should carefully examine them to establish that they accurately reflect his views and conclusions, and not those of counsel."). We are satisfied that Judge Young complied with this mandate.

and discretion, in view of the principal's conduct, would naturally suppose the agent to possess.

Rich Printing Co. v. McKellar's Estate, [46 Tenn. App. 444, 479,] 330 S.W.2d 361, 376 [(1959)]; *see V.L. Nicholson Co. v. Transcon Inv.*, 595 S.W.2d 474, 483 (Tenn. 1980).

It is well settled that apparent authority must be established through the acts of the principal rather than those of the agent. *E.g.*, ***Franklin Distrib. Co. v. Crush Int'l***, 726 S.W.2d 926, 931 (Tenn. [Ct.] App. 1986). Such requirement was adopted by our state supreme court in ***Southern Railway Co. v. Pickle***, 138 Tenn. 238, 197 S.W. 675 (1917), when stating:

The apparent power of an agent is to be determined by the acts of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct has created the apparent authority.

Southern Railway, [138 Tenn. at 246,] 197 S.W. at 677; *see also Franklin Distrib.*, 726 S.W.2d at 931.

Bells Banking Co. v. Jackson Centre, Inc., 938 S.W.2d 421, 424-25 (Tenn. Ct. App. 1996).

The Walkers and the church assert that the plaintiff relied solely upon the words and acts of Coburn to conclude that Coburn had agency authority to act for the church. The record clearly indicates otherwise. The Walkers provided Coburn with an office in their building. From this building, Coburn had access to a fax machine that provided a fax heading associated with Walkers' enterprises. The Walkers provided Coburn with access to their business files. The Walkers gave Coburn certificates and annuities, some originating from a Walker-controlled entity and others titled in the church's name, that were used by Coburn as collateral for the contracts with the plaintiff. The Walkers provided Coburn with a sales and use tax exemption for which Mr. Walker had applied. Coburn sent the plaintiff a resolution of the church's board. Because these actions could cause a man of reasonable prudence and diligence to believe that Coburn acted as the church's agent in the motor home purchases, we find that the evidence does not preponderate against the trial court's finding that Coburn "had been clothed with the apparent authority to deal for and in behalf of [the church]." This issue is resolved against the Walkers and the church.

D.

The Walkers and the church also argue that the doctrine of comparative fault should have been applied in this case. The allegations in the complaint and the evidence do not implicate this doctrine. In any event, we do not find any evidence of the plaintiff's fault in the transactions pertaining to the motor homes.

In their brief, the Walkers and the church assert that the trial court erred in finding that they were jointly and severally liable, relying upon the case of *McIntyre v. Balentine*, 833 S.W.2d 52 (1992). In a civil conspiracy, all conspirators have liability for all damages flowing from the conspiracy. *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002).

V.

The judgment of the trial court is affirmed. This matter is remanded to the trial court for enforcement of its judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellants, International Christian Church, Charles Clendell Walker and Delores Walker.

CHARLES D. SUSANO, JR., JUDGE